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No.

IN THE
Supreme Court of the United States
October Term, 1981

PASS WORD, INC. and RODNEY J. BACON
d/b/a COEUR D'ALENE ANSWERING SERVICE,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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July 1, 1982

QUESTIONS PRESENTED

Petitioners, licensees of Respondent Federal Communications Commission,[1] were ordered to show cause why their licenses should not be revoked for certain misrepresentations. They waived their right to an evidentiary hearing and submitted, instead, a written statement in explanation and mitigation. The Commission staff member who had acted as investigator-prosecutor under the order to show cause prepared a recommended decision for revocation and presented it ex parte to the Commissioners, who adopted it.

This intermingling of prosecutive and adjudicative functions was challenged by the licensees as violative of the Administrative Procedure Act. The Commission was advised ex parte by the investigator-prosecutor that the challenge was without merit and, pursuant to her recommendation, the petition for reconsideration was denied. The court of appeals, in affirming the revocation of the licenses, avoided the point that the intermingling of the prosecutive and adjudicative functions violated the Administrative Procedure Act by holding that the licensees had waived their right to object.

The following questions are presented:

1. Whether the decision of the court below, in holding that the licensees' argument had been waived even though it had been specifically presented in compliance with Section 405 of the Communications Act, 47 U.S.C. § 405, and had been fully considered by the agency, conflicts

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[1]The Estate of Jennings Bacon, which owns 51.5% of the stock of one of the Petitioners, was an intervenor in the court below and therefore is deemed to be a respondent in this proceeding.

with the holdings of the courts of appeals for two other federal circuits that no waiver occurs in these circumstances?

2. Whether the court of appeals' finding of a "knowing" waiver of Petitioners' rights under the Administrative Procedure Act conflicts with the standards for waiver established by this Court in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967)?

3. Whether waiver of an evidentiary hearing permits a federal administrative agency to dispense with the separation of functions requirements of the Administrative Procedure Act?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Pass Word, Inc. ("Pass Word") and Rodney J. Bacon d/b/a Coeur d'Alene Answering Service ("CDA") petition that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on April 2, 1982.

OPINIONS BELOW

The opinion of the court of appeals (App. A)[1] is reported at 673 F.2d 1363 (D.C. Cir. 1982). The Order of

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[1]App. refers to the Appendix to this Petition.

the Commission (App. B) is reported at 76 F.C.C.2d 465 (1980), and its opinion denying reconsideration (App. C) is reported at 86 F.C.C.2d 437 (1981).

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1982. The jurisdiction of this Court is invoked under 47 U.S.C. § 402(j) and 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 5(c) of the Administrative Procedure Act, 5 U.S.C. § 554(d), states in pertinent part:

> "An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply –
>
> (A) in determining applications for initial licenses;
>
> (B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
>
> (C) to the agency or a member or members of the body comprising the agency."

Section 405 of the Communications Act, 47 U.S.C. § 405, states in pertinent part:

> "The filing of a petition for rehearing shall not be a condition precedent to judicial review of any

such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceeding resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass."

STATEMENT OF THE CASE

Pass Word and CDA are licensees of the Federal Communications Commission ("FCC" or "Commission") in the Domestic Public Land Mobile Radio Service in Spokane, Washington and Coeur d'Alene, Idaho, respectively. They provide paging, mobile telephone, and answering services in Spokane and Coeur d'Alene and the surrounding rural areas. Bacon owns CDA and is president and owner of 49.5% of the stock of Pass Word.[3]

During 1972, Pass Word and CDA applied to the Commission for construction permits for additional facilities. The two permits were issued in 1973 and 1974, requiring construction to be completed within eight months of the respective grant dates. In June 1974, Bacon notified the Commission that construction had been completed and that both Pass Word's and CDA's facilities were ready for operation, even though construction was not actually completed until many months later.

In 1976, the Commission issued an order requiring Pass Word and CDA to show cause why their licenses should not be revoked because of these and related misrepresentations, and designating issues for hearing. *Pass Word, Inc.*,

[3]Pass Word, Inc., apart from CDA, has no parent company, subsidiary, or affiliate for purposes of Rule 28.1 of the Rules of this Court.

61 F.C.C. 2d 410 (1976) (J.A. 73).[4] On October 28, 1976, three members of the Commission's Common Carrier Bureau's trial staff entered appearances in the revocation proceeding. J.A. 108. Their duty was to function both as investigators and prosecutors supporting revocation. They began by propounding detailed interrogatories and document production requests to Pass Word and CDA.

The licensees, with the approval of the Administrative Law Judge designated by the Commission to preside at the evidentiary hearing, waived their right to such a hearing and chose instead to submit a statement in explanation of the delays in construction and setting forth factors mitigating the misrepresentations.[5] The Bureau's trial staff demanded that, as a condition of waiver, Pass Word and CDA complete their responses to the staff's discovery requests. Pass Word and CDA complied with this demand and filed their mitigation statement on March 12, 1977. J.A. 116.

On December 19, 1979, the Commission held an open meeting concerning Pass Word and CDA. At the meeting, the principal member of the trial staff investigating and prosecuting the case presented a recommended decision which she had prepared revoking all of Pass Word's and CDA's licenses. Petitioners were not afforded any opportunity to reply. The Commission, after a brief colloquy, adopted the proposed decision.[6]

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[4]J.A. refers to the Joint Appendix in the court of appeals.

[5]Section 1.92(b) of the Commission's rules, 47 C.F.R. § 1.92(b), provides that following a waiver of hearing in a revocation proceeding, the respondent licensee may submit "a written statement signed by the respondent denying or seeking to mitigate or justify the circumstances or conduct complained of . . .."

[6]Official Tape of Commisison Meeting, Dec. 19, 1979. Instead of preparing transcripts of its meetings, the Commission tapes them and

The opinion (App. B) concluded that Pass Word and CDA had engaged in a series of deliberate misrepresentations concerning the date when construction was completed, in seeking to explain the delays in construction, and in later applications for additional facilities. The Commission concluded that the licensees' otherwise exemplary service record, the steps undertaken by them to prevent recurrence of the misrepresentations, their showing that there were inadequate available alternative services, and other factors did not constitute sufficient mitigation to overcome the sanctions which it decided to impose for the misrepresentations, namely, revocation of all of Pass Word's and CDA's licenses.

Pass Word and CDA filed a timely petition for reconsideration (J.A. 272) in which they argued, among other things, that the participation of the investigator-prosecutor in the Commission's deliberations and her writing of the agency's opinion violated the prohibition in Section 5(c) of the Administrative Procedure Act (APA) on the intermingling of investigators or prosecutors in the decision-making process.

The Commission denied reconsideration after being advised ex parte by the same investigator-prosecutor that the challenge was without merit. (App. C)[7] The Commisson held that Pass Word and CDA's waiver of an evidentiary hearing before the Administrative Law Judge was an implicit waiver of the APA separation of functions requirements.

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makes a duplicate tape available upon request. A copy of the tape of this meeting and of the meeting where the reconsideration decision was adopted, along with transcripts prepared from the tapes, were lodged with the court of appeals with its permission.

[7]Official Tape of Commission meeting, April 23, 1982. See note 6, *supra*.

On appeal to the United States Court of Appeals for the District of Columbia Circuit pursuant to Section 402(b) of the Communications Act, 47 U.S.C. § 402(b), Pass Word and CDA argued that neither the APA nor its legislative history permitted an agency to dispense with functional separations requirements in an adjudicatory case merely because no evidentiary hearing occurred. In the brief for the Commission, the agency's counsel for the first time suggested that Pass Word and CDA had waived their right to object to the staff's participation by not raising the matter before the Commission reached its decision. Pass Word and CDA pointed out in reply that the Commission had not found a knowing waiver, and hardly could have done so given the fact that more than ten months after Pass Word and CDA had waived their evidentiary hearing, the Commission held in an unrelated case that the effect of such a waiver did not appear to have been understood. Petitioners stressed the fact that they had raised the issue at the first opportunity after they became aware of the investigator-prosecutor's activities.

The court of appeals did not rule on Pass Word and CDA's argument, but instead affirmed the agency's decision, holding that Petitioners had knowingly waived their right to object. It stated:

> "Appellants first raised this objection in their April 1980 Petition for Partial Reconsideration, when alteration of the mode of proceeding in this case was impossible. However, appellants previously knew or should have known, particularly after the Commission's decision in *Mullin, Connor & Rhyne,* 41 Rad.Reg. (P&F) 1681 (1977), that it is the FCC's general practice not to require separation of functions after a waiver of hearing.

See also Amendments of Part I of the Commission's Rules Concerning Revocation and Cease and Desist Proceedings, 25 Fed. Reg. 12602 (1960). Failure to interpose a timely challenge to the Commission's routine and published mode of proceeding precludes appellants from prevailing on this point." App. 3a.

REASONS FOR GRANTING THE WRIT

Although Pass Word and CDA, at the first opportunity legally available to them, had fully presented to the Commission their arguments that the ex parte participation in the decisionmaking process of the FCC's investigator-prosecutor violated the APA, the court of appeals found that the licensees had knowingly waived their right to object to this procedure and were precluded from pressing the argument on appeal. Three grounds for the exercise of this Court's jurisdiction are raised.

The refusal of the court of appeals to consider an argument timely and properly raised in a petition for reconsideration to the Commission and fully considered on the merits by the agency – at a time when, contrary to the court's opinion, "alteration of the mode of proceeding" was possible – squarely conflicts with a holding on the same point by the United States Court of Appeals for the Seventh Circuit in *Wilson & Co. v. United States.*[8] In that case, the court held that the petitioners had not waived their right to argue a breach of the APA functional intermingling prohibition, even though the matter had not been presented to the FCC at all and was raised for the first

[8] 335 F.2d 788 (7th Cir. 1964), *cert. denied,* 380 U.S. 951 (1965), *remanded,* 382 U.S. 454 (1966).

time in the court of appeals. The decision below is also inconsistent with the holding of the United States Court of Appeals for the Ninth Circuit in *Getty Oil Co. v. Andrus,*[9] which held that no waiver would occur if a party asserted a contention before the end of the administrative process. The holding in *Getty Oil* is in accord with Section 405 of the Communications Act, 47 U.S.C. § 405, which requires only that a party present an issue of this kind to the Commission in a petition for rehearing, as Pass Word and CDA did, as a precondition to arguing it on appeal. The holding of the court below that the right to have adjudication separated from prosecution had been knowingly waived also conflicts with the standards for waiver of such rights established by this Court in *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967).

The decision below presents, therefore, an important question concerning appellate review of denials of APA procedures on which the circuits have expressed conflicting views. It also presents the question of the standards which may be applied to determine when a "knowing" waiver of procedural rights has occurred. Moreover, the court's affirmance of the Commission's decision to the effect that the waiver of a hearing deprives a licensee of the guarantee of an administrative adjudication free from the ex parte participation of agency prosecutors presents a dangerous exception to provisions the Congress intended to be all-encompassing. Review by this Court is thus needed to preserve what this Court has recognized as a right "fundamental" to the APA.[10]

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[9]607 F.2d 253 (9th Cir. 1979).

[10]*See* Wong Yang Sung v. McGrath, 339 U.S. 33, 41 (1950).

I. The Decision Below, in Conflict With the Holdings of Two Courts of Appeals and the Communications Act, Foreclosed Petitioners From Reliance Upon a Fundamental Procedural Point Fully Presented to the Commission

At the Commission's open meeting on December 19, 1979, during which the order revoking Pass Word's and CDA's licenses was adopted, Petitioners became aware for the first time that the principal staff member assigned to investigate and prosecute them had both written a decision recommending total forfeiture of their licenses and was presenting it ex parte to the Commission. Petitioners vigorously protested this procedure in their petition for reconsideration, arguing that it violated Section 5(c) of the APA, 5 U.S.C. § 554(d). In denying their petition, the Commission did not question the timeliness of Pass Word and CDA's objections, but instead concluded that, having waived an evidentiary hearing before the Administrative Law Judge, they had no right to the procedural protections of the APA. The court of appeals nevertheless held that the right to object to the APA violation had been waived by the licensees' failure to protest earlier.[11] The court of appeals' holding in this case is in conflict with the decisions of two other courts of appeals, decisions which are in accord with the rehearing provisions of the Communications Act.

In *Wilson & Co. v. United States*, 335 F.2d 788 (7th Cir. 1964), *cert. denied*, 380 U.S. 951 (1965), *remanded*, 382 U.S. 454 (1966), counsel to the FCC's Common Carrier

[11] In relying on a theory of waiver neither adopted nor even mentioned by the Commission, the court of appeals violated the established principle of judicial review that a reviewing court cannot substitute its own grounds for those adopted by the agency. SEC v. Chenery Corp., 318 U.S. 80, 88 (1943).

Bureau had participated in the Commission's decision. No objection was made to this procedure either prior to the Commission's decision or on reconsideration. In the court of appeals, petitioners argued for the first time that the staff's participation in the decision violated the APA. The Commission responded that the petitioners had waived the right to argue the error on appeal by failing to raise it during the administrative proceedings.

The Seventh Circuit disagreed, stating:

> "We are not persuaded by the argument of the Commission and AT&T that petitioners were on notice during the hearing that such participation in the decisionmaking process might occur and hence should have filed their objections with the Commission."[12]

The court concluded that no waiver had occurred, even though it recognized that the Commission's rules could be read as apprising petitioners of the role the staff would play. 335 F.2d at 797 & n.4.[13] Thus, even where the Commission's failure to abide by the APA had never been argued to the agency, the Seventh Circuit nevertheless found that no waiver had occurred — a conclusion directly opposite from the one reached by the court of appeals below.[14]

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[12]335 F.2d at 794.

[13]It is noteworthy that the provision which was not read as notification to petitioners by the Seventh Circuit was actually a part of the Commission's Rules, while the court below relied in part on an introductory statement never incorporated in the agency's published Rules. (App. 3a)

[14]After finding that there was no bar to petitioners making their APA argument, the *Wilson* court went on to consider the merits. Since, unlike this case, the Commission proceeding in *Wilson* was rulemaking and not adjudication, the court ultimately concluded that the staff's participation in those circumstances did not contravene the APA.

The court of appeals' decision is also in conflict with *Getty Oil Co. v. Andrus,* 607 F.2d 253 (9th Cir. 1979), which involved the awarding of geothermal steam leases by the Secretary of Interior. After one party's application has been approved, Getty brought up for the first time the contention that the applicant had not properly disclosed the parties in interest as required by Department of Interior rules. On review, the district court held that the doctrines of exhaustion of administrative remedies and waiver barred from consideration Getty's contention since it had not been raised until after the initial grant decision. The court of appeals held, however, that:

> "Exhaustion of remedies and waiver . . . are doctrines to be invoked only when the administrative process has been completed. They are not designed to extinguish claims which, although not comprehensively or artfully presented in the early stages of the administrative process, *are presented fully before the process ends.*"[15]

The Ninth Circuit concluded that because Getty had raised its arguments before the administrative proceedings were finally completed, it was not barred from making those contentions on appeal, a holding strikingly at odds with that reached by the court of appeals in this case.

The principle applied in *Getty Oil* is supported by Section 405 of the Communications Act, 47 U.S.C. § 405, concerning petitions for rehearing of Commission decisions. In pertinent part, Section 405 states:

> "The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order, decision, report, or action, except

[15] 607 F.2d at 256 (emphasis added).

> where the party seeking such review . . . relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass."

The purpose of this provision is "to afford the Commission the initial opportunity to correct errors in its decision or the proceeding leading to decision." *Rogers Radio Communications Services, Inc. v. FCC*, 593 F.2d 1225, 1229 (D.C. Cir. 1978). With certain exceptions, Section 405 bars judicial consideration of matters not presented to the agency. By the same token, however, once a party has sought reconsideration to give the Commission an opportunity to correct its decision, judicial consideration of the party's arguments should be insured. The statutory grant of rehearing procedures to permit new arguments to be raised would become a nullity if, after a party raises an issue on reconsideration, review is still foreclosed by the court's ruling that the issue should have been argued earlier.

Getty Oil's holding that once an issue is fully considered by the agency, it cannot be deemed waived, is in line with Section 405. In *Great Falls Community TV Cable Co., Inc. v. FCC*, 416 F.2d 238 (9th Cir. 1969), the United States Court of Appeals for the Ninth Circuit permitted the petitioner to argue on appeal any issues on which the Commission had had opportunity to pass. *Id.* at 239-40. But on an issue not raised before the agency and on which reconsideration was not sought, review was deemed barred. *Id.* at 242-43.

The court below was also wrong in asserting that Pass Word and CDA objected to the FCC's procedures only "when alteration of the mode of proceeding in this case was impossible." (App. 3a) If the Commission had con-

cluded that its procedures were flawed, it could have referred the record to its Office of Opinions and Review for appraisal of the case and the preparation of a new opinion. Although that office was established to enable the Commission to rely on an independent adjudicative staff separate from investigating and prosecuting personnel,[16] the Commission chose not to seek its aid.

Under the standards of *Wilson* and *Getty Oil* and the policy of Section 405, Pass Word and CDA were fully entitled to press the APA argument made to the FCC before the court of appeals. The decision below thus squarely conflicts with the holdings of two other courts of appeals that such arguments may not be deemed waived on appeal.[17]

II. The Holding Below of a "Knowing" Waiver is Contrary to the Standard Set by This Court and the Policy Underlying the Waiver Doctrine

The court of appeals held that Pass Word and CDA "knew or should have known" before the Commission acted that in making its decision it would not conform to the APA separation of functions requirements, and that the failure to protest the violation before it occurred precluded the licensees from raising the argument later.

[16] *See* 47 C.F.R. § 0.171. The Office of Opinions and Review was recently merged with the Office of General Counsel and now is known as the Adjudication Division of that office. Reorganization of the Office of Opinions and Review and the Office of General Counsel, 46 Fed. Reg. 57,049 (1981).

[17] In similar circumstances where the circuits were in conflict on whether the Internal Revenue Service had waived arguments not raised before the Board of Tax Appeals, certiorari was granted to resolve the conflict in Hormel v. Helvering, 312 U.S. 552, 555 (1941). See p. 19, *infra*.

The court's assumption that a knowing waiver occurred, based in large measure on a decision in another case announced almost a year after Pass Word and CDA elected to proceed without an evidentiary hearing is, as we shall demonstrate below, in derogation of this Court's decision in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and the policies which support the waiver doctrine.

Pass Word and CDA sought leave to proceed without an evidentiary hearing on January 18, 1977. Leave was granted by the Administrative Law Judge on February 11, 1977, and the licensees' mitigation statement was filed on March 12, 1977. The decision relied on by the court of appeals to show that Pass Word and CDA knew that the FCC would permit its prosecutor to participate in its decision, was announced in December 1977 and was never officially published. *Mullin, Connor and Rhyne*, 41 Radio Reg. 2d (P&F) 1681 (1977).[18]

The finding of the court that Pass Word and CDA "knew" they were giving up their APA rights thus rests on a letter written by the Commission to another litigant almost one year after Pass Word and CDA elected to pro-

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[18]In *Mullin*, another revocation proceeding, the Commission, in a letter to counsel written more than ten months after Pass Word and CDA waived their hearing, had stated that its policy was that waiver of an evidentiary hearing constituted a waiver of other procedural rights before the Commission and that such cases would be presented to the Commission by its investigative staff as nonhearing items. Such presentations would not be deemed ex parte contacts. The Commission went on in that case to state that: "[s]ince the procedures used when waiving the right to a hearing do not appear to have been understood fully by [the licensee, it] . . . is hereby given the opportunity to withdraw its waiver of hearing. . . ." *Id.* at 1682. The Commission's letter only appeared in Pike & Fisher Radio Regulation on January 11, 1978.

ceed without an evidentiary hearing. In addition to that single, unofficially reported letter, the court cited the 1960 introduction to the Commission's amended revocation rules (App. 3a), which contained a single comment that separation of functions requirements would not be applied when a hearing was waived. That comment, however, was neither embodied in the actual rules nor incorporated into the agency's reports.

In *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950), the Court characterized the separation of agency functions as having been one of the "fundamental" purposes of the APA.[19] It stated:

> "'A genuinely impartial hearing, conducted with critical detachment, is psychologically improbable if not impossible, when the presiding officer has at once the responsibility of appraising the strength of the case and seeking to make it as strong as possible.'"[20]

When fundamental rights are at issue, this Court has ruled that "[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). There was nothing in the record before the court of appeals to indicate that Pass Word and CDA either had any intent to give up such an important right under the APA to separation of agency functions or even knew that the waiver of a

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[19]The broad application of section 5(c) of the APA and the intent of Congress to separate investigation and prosecution from agency decisionmaking was recognized in Withrow v. Larkin, 421 U.S. 35, 52 (1975).

[20]339 U.S. at 44, *quoting* The Secretary of Labor's Committee on Admnistrative Procedure, The Immigration and Naturalization Service 82 (Mimeo. 1940); *see Developments in the Law - Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1419 (1981).

hearing might create such a possibility until the Commission's investigator-prosecutor presented the proposed decision ex parte to the Commission at the meeting where their licenses were revoked.[21]

In *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967), Curtis, the defendant in a libel action, had not interposed any constitutional defenses prior to its trial. After the trial, *New York Times v. Sullivan,* 376 U.S. 254 (1964), was decided and Curtis made constitutional arguments relying on it in an unsuccessful motion for a new trial. The court of appeals refused to address Curtis' constitutional argument, holding that Curtis had waived any such claims by not raising them prior to trial. Because of the ferment in libel law generally and the fact that some of Curtis' attorneys had also been counsel in the *New York Times* litigation, the court concluded that Curtis should have been aware of the potential constitutional issues. *Curtis Publishing Co. v. Butts,* 351 F.2d 702 (5th Cir. 1965).

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[21]This distinguishes the case at bar from International Paper Co. v. FPC, 438 F.2d 1349 (2d Cir.), *cert. denied,* 404 U.S. 827 (1971), relied on by the court of appeals (App. 3a), where the petitioner's counsel had served for more than 30 years in the agency's solicitor's office and indisputably knew of its practices. Commission counsel at the court of appeals also cited in support of their waiver argument the Common Carrier Bureau's response to the opposition to Pass Word and CDA's waiver request filed by a competing applicant. Reply of the Chief, Common Carrier Bureau, to Qualified Opposition of Courtesy Communications, Inc., filed Feb. 4, 1977, J.A. 110. Responding to the competitor's request that it and the Bureau be permitted to comment on Pass Word and CDA's statement, the Bureau stated that it would continue to make inquiries and would "advise the Commission regarding the disposition of the revocation issues." That statement, addressed to another party, that the staff would "advise" the agency did not suggest that such advice would be offered ex parte or that the staff would assume a decisionmaking function.

This Court reversed the finding of waiver.[22] It held that Curtis' attorneys had not been unreasonable, before the *New York Times* decision was announced, in focusing solely on state law defenses. 388 U.S. at 144. As to the participation of some of Curtis' attorneys in the *New York Times* case, Justice Harlan stated: "we think it inadvisable to determine whether a 'right or privilege' is 'known' by relying on information outside the record concerning the special legal knowledge of particular attorneys." *Id.*

Rejection of the waiver argument was also deemed by the Court to be in the interests of justice. Curtis had raised its argument in time for the courts below to consider it. Moreover,

> "[t]he resolution of the merits of Curtis' contentions by the District Court makes it evident that Butts was not prejudiced by the time at which Curtis raised its argument, for it cannot be asserted that an earlier interposition would have resulted in any different proceedings below." *Id.* at 145 (footnote omitted).

The court of appeals in the present case held that Pass Word and CDA "knew or should have known" that the FCC would not follow the procedures mandated by the APA, relying on a letter to counsel in an unrelated case written months after the licensees elected not to have an evidentiary hearing. This Court in *Curtis* rejected the approach of the court below, finding that knowledge sufficient to justify waiver could not be presumed merely from the state of the law or the supposed knowledge of counsel, particularly where the matter deemed abandoned turns on

[22] Justice Harlan's plurality opinion was joined on the waiver issue by Justices Brennan and White, making that portion of his opinion a majority holding. 388 U.S. at 172 n.1 (Opinion of Brennan, J.).

a decision announced after the presumed waiver. As other courts of appeals have emphasized, waivers must be of a *known* right. *See Sambo's Restaurants, Inc. v. City of Ann Arbor, 663 F.2d 686, 693 (6th Cir. 1981); Holzsager v. Valley Hospital,* 646 F.2d 792, 796 (2d Cir. 1981).[23]

When Pass Word and CDA learned of the FCC's violation of the APA, they promptly brought it to the Commission's attention.[24] The court of appeals' finding of a knowing waiver in these circumstances cannot be reconciled with *Curtis Publishing.*

Further, in light of Justice Harlan's reasoning in *Curtis Publishing,* the court of appeals' holding is manifestly unjust. Pass Word and CDA gave the Commission a full opportunity to correct its error.[25] The agency's rejection of the licensees' arguments amply demonstrates that the

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[23]The court in *Holzsager* stated (646 F.2d at 796):

> "[A] party cannot be deemed to have waived objections or defenses which were not known to be available at the time they first could have been made, especially when it does raise the objections as soon as their cognizability is made apparent."

[24]That Pass Word and CDA at the first opportunity brought their APA argument to the Commission's attention contrasts with the situation in United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952), where the appellee "did not bestir itself to learn the facts until long after the administrative proceeding was closed and months after the case was at issue in the District Court. . . ." *Id.* at 35. Moreover, the waiver holding in *Tucker* also rested on the absence of any potential prejudice, the Court noting that the improperly appointed examiner "did not act and was not expected to act as prosecutor and judge." *Id.*

[25]As noted above, the court was incorrect in finding that, once the revocation decision had been reached, the procedural error could not be rectified. The Commission could have vacated its decision and ordered a new opinion prepared by its Office of Opinions and Review, an entity specifically established to independently assist the agency in adjudications. See pp. 12-13, *supra.*

Commission was not prejudiced by any delay since it obviously would have denied Pass Word and CDA's claim even if it had been made earlier. That an earlier objection would have served no purpose is evidenced by the fact that even after Pass Word and CDA had argued that the preparation of the decision by the prosecutor violated the APA, the same individual wrote and presented the agency's reconsideration decision denying Pass Word and CDA's argument that her previous participation had been improper.

In *Hormel v. Helvering*, 312 U.S. 552 (1941), Justice Black explained that the normal rule that appellate courts would not consider issues not raised below rested on two factors. First, parties should have an opportunity to lay their entire case before the finder of fact. Second, litigants should not be surprised on appeal by new issues. *Id.* at 556; *see* Note, *Waiver of a Previously Unrecognized Defense: Must Lawyers be Seers?* 114 U. PA. L. REV. 451, 456-57 (1966). Having had Pass Word and CDA's contention that the APA had been violated fully presented to it, the Commission could hardly have been surprised when the licensees pressed the point on appeal. The waiver holding of the court below thus is unsupported by either of the policies buttressing the general waiver doctrine.[26]

The court of appeals' refusal to consider Pass Word and CDA's arguments that the right to functional separation guaranteed them by the APA had been denied must be condemned under the standards of *Curtis Publishing* and *Hormel*. Review by this Court is essential to ensure that

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[26]In *Hormel*, Justic Black, while recognizing the general waiver rule, emphasized that "such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice." 312 U.S. at 558.

parties' rights are not casually deemed waived in the course of litigation.

III. The FCC Intermingled Prosecution and Adjudication in Violation of the APA

Although the court below, in view of its waiver holding, did not rule on Pass Word and CDA's contention that the participation of the agency's prosecutor in its decision violated the APA, another reason for this Court's review is to correct the Commission's restrictive application of Section 5(c) of the APA. The Commission did not deny that it had brought its prosecutor ex parte into the decisionmaking process; it only held, without citing any independent authority, that in the absence of an evidentiary hearing, the APA's separation of functions provisions were not applicable to its proceeding.[27] (App. 9c-11c.)

The APA contains no such exemption. By its terms, Section 5(c) applies to "every case of adjudication required by statute to be determined on the record after *opportunity for an agency hearing* . . . ."[28]

The legislative history of the APA confirms that all adjudications were intended to be included in the separation of functions provisions. In the Senate Judiciary Committee Print of 1945, *reprinted in* ADMINISTRATIVE PROCEDURE

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[27] Although as the Court recognized in Withrow v. Larkin, 421 U.S. 35, 52 (1975), the APA prohibits functional intermingling without regard to the presence of actual bias, the Commission's opinion reflects the prosecutorial bias of its author, particularly with regard to the dimsissal of Pass Word's and CDA's extensive record of meritorious service. See App. 85b-88b.

[28] Emphasis added. Section 312 of the Communications Act, 47 U.S.C. § 312, which governs revocations, contains an absolute grant of a hearing opportunity.

ACT - LEGISLATIVE HISTORY, 79th Cong., 1944-46 at 24 (1946), the Committee referred to Section 5(c) as applying to all "so-called 'accusatory proceedings.'" It did not suggest any other limits such as the conduct of an evidentiary hearing. In subsequent discussion of the limited statutory exemptions from the separation of functions requirements for initial licensing and similar proceedings, the same Committee emphasized that if even those cases became "accusatory" in nature, as this case certainly was, "[a]gencies should not apply the exceptions . . . ." S. REP. No. 572, 79th Cong., 1st Sess. (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT - LEGISLATIVE HISTORY, 79th Cong., 1944-46 at 204 (1946). Congress' intent, therefore, was not restricted to formal hearing cases, but instead was to require that investigating and prosecuting in all accusatory cases be separated from agency decisionmaking.[29]

The concern of the drafters of the APA was that "'[a] man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions.'"[30] Although no evidentiary hearing took place below, the participation in the Commission's decisionmaking process of a staff member whose duty was to support revocation prevented Pass

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[29]The Department of Justice, in interpreting the APA, also concluded that Section 5(c) applied to any "*agency-initiated* modification or amendment of licenses. . . ." United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 51 (1947) (emphasis in original). *See also* Shulman, *Separation of Functions in Formal Licensing Adjudications*, 56 NOTRE DAME LAW. 351, 359-60 (1981); Davis, *Separation of Functions in Administrative Agencies*, 61 HARV. L. REV. 612, 636-37 (1948).

[30]REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 56 (1941), *quoted in* Grolier, Inc. v. FTC, 615 F.2d 1215, 1219 (9th Cir. 1980).

Word and CDA from receiving the unbiased judgment required by the APA. The Commission's stated view that it does not consider itself obliged to follow separations of functions requirements where hearings are waived means that the problem will not be limited to this case; instead other licensees will be forced to undertake costly and otherwise unneeded evidentiary hearing proceedings in order to preserve their procedural rights under the APA to a decision untainted by the ex parte intervention of the prosecutor into the agency's decision.

CONCLUSION

For the foregoing reasons, review by this Court is necessary and this petition for a writ of certiorari should be granted.

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